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No. 218

In the Supreme Court of the United States

October Term, 1948.

UGH HENDERSON, BY J. WILLARD GRAGG, NEXT FRIEND, *Petitioner,*

vs.

SHELL OIL COMPANY, INC., *ET AL., Respondents.*

SUPPLEMENTAL BRIEF OF SHELL OIL COMPANY, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May It Please the Court:

Our only excuse for burdening this Court with a supplemental brief is the fact that while the case at bar was pending in the Supreme Court of Texas the Supreme Court of Iowa overruled the case upon which petitioner so strongly relies. *Raher* v. *Raher,* 150 Ia. 511, 129 N. W. 494, is discussed at length at pages 23-24 of petitioner's original brief. In that case the Supreme Court of Iowa held that under the Iowa statutes an action for the appointment of a guardian for a *resident* was an action *in personam* and personal service was necessary. Petitioner contended at page 35 of his original brief that the *Raher* case was at variance with *Wallace* v. *Tinney,* 145 Ia. 478, 122 N. W. 936, discussed at pages 27-28 of our former brief, wherein the Supreme Court of Iowa held that an action for the appointment of a guard-

ian of the estate of a *nonresident* person of unsound mind was an action *in rem* and personal service was not necessary. While, as shown in our former brief, the *Raher* case is distinguishable from the case at bar, even the specious argument made by petitioner in reliance on the *Raher* case is silenced by *Edwards* v. *Smith*, 29 N. W. (2d) 404 (not officially reported), wherein the Supreme Court of Iowa, in expressly overruling *Raher* v. *Raher, supra*, said:

> "Since the Iowa decisions are inconclusive we must weigh the *Raher* opinion with other scales. The initial premise upon which it rests—and must rest—seems to us unsound. *Proceedings for the appointment of guardians of property of alleged incompetents, resident or nonresident, are at least quasi in rem.* Care and conservation of the property is the primary purpose. The mental condition of the owner is incidental. An adjudication of incompetency is solely for the purpose of conserving the property in the owner's interest. • • • (2 c. 406)
>
> "• • • However, these are thoughts we need not pursue in the instant case. We hold a judgment appointing guardian of a ward's property in Iowa is *in rem* and properly based upon personal service outside the state. The decision in *Raher* v. *Raher* must be overruled." (2 c. 406)

Like other courts that have passed upon the question, the Supreme Court of Iowa now holds that an action for the appointment of a guardian *of the estate* of a person of unsound mind is an action *in rem* regardless of whether the incompetent be a resident or a nonresident and that *constructive notice is sufficient in either case.*

In pointing out the errors which appear in petitioner's reply brief we shall follow the same order and use the same numbers as petitioner did in his summary of argument.

I.

Petitioner contends on page 4 of his reply brief that a part of our argument is based on the premise that Hugh Henderson is insane. We submit that the question of Hugh Henderson's insanity was not controverted in the District Court or in the appellate courts of Texas and that such insanity is not being questioned in this Court. If there is anything that has been certain from the beginning of this case it is that Hugh Henderson is and has been for many years a person of unsound mind. Petitioner's original application for certiorari to the District Court, purporting to have been filed by "Hugh Henderson, individually" and by his next friend, alleged that Hugh Henderson "is now and has been for more than 30 years a person of unsound mind" (R. 2); his second supplemental petition filed by J. Willard Gragg, his present next friend, stated, "Hugh Henderson has been and is now under disability of a person *non compos mentis*" (R. 31); the District Court, after hearing evidence on the question at the time J. Willard Gragg was appointed next friend, found that "Hugh Henderson is now and has been at all times material to this controversy a person of unsound mind" (R. 10); and in the judgment appealed from herein the District Court likewise found Hugh Henderson was a person of unsound mind (R. 33-38). The finding of fact regarding Hugh Henderson's insanity was not attacked in the appellate courts of Texas and it is not questioned in the petition for writ of certiorari filed in this Court. The fact that petitioner pleaded and proved his insanity was not mere inadvertence. It was necessary in order to establish the jurisdiction of the District Court, since Article 932, Rev. Civ. Stats 1925, provides that certiorari to the District Court shall be brought within two years

"and not afterwards," except that persons *non compos mentis* shall have two years after the removal of their disability within which to bring such action. The 1918 order appointing a guardian for Hugh Henderson's Texas estate (R. 53) was made 25 years before this action was filed in the District Court (R. 2) and the 1939 order (R. 60) was made four years prior thereto. Consequently, it was necessary for petitioner to allege and prove insanity in order to escape the effect of this two-year statute. He may not now contend that he is in fact sane.

II.

On page 5 of his reply brief petitioner accuses this respondent of telling a falsehood and untruth. He asserts that we stated Hugh Henderson had been adjudicated insane by a Missouri court. What we actually said was—"The District Court found that on March 6, 1908, while a resident of Pike County, Missouri, Hugh Henderson was duly adjudicated to be a person of unsound mind and that thereafter he spent twelve years in an insane asylum at Fulton, Missouri." (Brief 5) If this statement is "false and untrue," as asserted by petitioner, then the transcript of the record prepared by him and filed in this Court likewise is false and untrue, since that statement was taken from the record. The record states as follows:

> "• • • In connection with that specific attack this court finds that on March 6, 1908, Hugh Henderson was a resident citizen domiciled in Pike County, Missouri, and on that date he was duly adjudicated to be a person of unsound mind by a court of competent jurisdiction in Pike County, Missouri; that thereafter on the 7th day of March, 1908, the said Hugh Henderson was transported to Fulton, Missouri, and there confined in the State Institution for the Insane at Fulton, Missouri,

continuously from March 7, 1908, until August 4, 1920, at which time he escaped from said institution and since which time he has not been confined therein * * *." (R. 35)

This finding of the District Court has not been attacked in petitioner's application for writ of certiorari to this Court.

III.

Pages 6 and 7 and a part of page 8 of petitioner's reply brief are given over to the argument that the notice served on Hugh Henderson in Missouri was not provided for by statute. We so conceded in our original brief at page 10, wherein we stated:

"* * * Likewise, Hugh Henderson was personally served in Missouri, *although such personal service was not required by the statute.*" (Emphasis supplied.)

The statutory notice given in 1939 was by posting (R. 57-58). *The Supreme Court of Texas held that the posting notice was sufficient* (R. 92). It was constructive in its nature. Likewise, personal out of state notice, even when required by statute, is only constructive in its effect. Thus it will be seen that *the notice given in this case exceeded that required by the statute.* Not only was the statutory posting notice given, but an additional unnecessary personal notice was served on Hugh Henderson in Missouri, and it was by reason of this unnecessary personal notice that he was afforded an opportunity to come to Texas and to be present in the courtroom at the time a guardian for his Texas estate was appointed in 1939.

IV.

Petitioner asserts on page 8 of his reply brief that Hugh Henderson's physical presence in the courtroom did not constitute an appearance. This is another question that petitioner did not raise by his petition for certiorari in this Court. The County Court order appointing the guardian of his estate states, "*and came also Hugh Henderson in person.*" (R. 60) Petitioner does not attack this finding in his application for writ of certiorari, nor did he request that the evidence upon which it was based be placed in the transcript of the record. This finding of the court is therefore binding upon him. The jurisdiction of the District Court is discussed at pages 7-8 of our former brief.

V.

Petitioner's contention that there was no prior seizure is fully answered by *Wootters* v. *Wynne,* (Civ. App. Tex.) 7 S. W. (2d) 940 (no writ), discussed at pages 23-24 of our answer brief, wherein it was held that the County Court acquired jurisdiction of petitioner's estate upon the filing of the application for the appointment of a guardian. The same contention was overruled by this Court in *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125.

VI.

At page 10 of his reply brief petitioner chides us for discussing questions other than the merits of this case. We submit that in his reply brief there is not a single case cited which discusses the merits of the case. In spite of the fact that, as he states, our brief contains a large number of citations, he has not taken issue with a single authority cited by us, nor has he attempted to point to any errors in our discussion of his authorities. It is therefore reasonable to

assume that petitioner agrees with our statement of what the authorities cited by us hold, as well as with our statement of the distinguishing characteristics in the authorities cited by him. Of the many cases cited by us, the only one which petitioner attempts to distinguish is *Chaloner* v. *Sherman,* 242 U. S. 455, 61 L. ed. 427, and he does not contend that case is not an authority for the point under which we cited it. Petitioner's Specification of Error A (Orig. br. 17) was that the courts of Texas were without jurisdiction to determine the insanity of a nonresident. We cited the *Chaloner* case as holding to the contrary. On page 10 of our brief we conceded that the *Chaloner* case did not discuss the question of whether constructive service is sufficient in a guardianship proceeding. On the other hand, commencing on page 11 of our brief, we cited two cases from England, twenty-five cases from the state appellate courts, and three cases from this Court (*Jones* v. *Prairie Oil and Gas Co.,* 273 U. S. 195, 71 L. ed. 602; *Cunnius* v. *Reading School District,* 198 U. S. 458, 49 L. ed. 1125; and *Blinn* v. *Nelson,* 222 U. S. 1, 56 L. ed. 65), all of which hold that under proper statutory provision a guardian of the estate may be appointed on constructive notice. No attempt was made to distinguish or even discuss any of these cases.

VII.

Petitioner asserts on page 3 of his reply brief that the confusion regarding "due process" is manifested and demonstrated by the number of citations in our briefs. This is indeed an unique argument since there is no conflict in the cases. We cite thirty cases to the effect that under proper statutory authority a *guardian of the estate* may be appointed upon constructive notice. Petitioner cites only one case to the contrary (*Redmon* v. *Leach* (Civ. App. Dallas),

130 S. W. (2d) 873) and that case was repudiated by the Supreme Court of Texas in the case at bar.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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